

**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

<b>LUCIA SWANSON</b>	)	
Claimant	)	
	)	
V.	)	
	)	
<b>CARGILL MEAT SOLUTIONS CORP.</b>	)	
Respondent	)	Docket No. 1,068,127
	)	
AND	)	
	)	
<b>NEW HAMPSHIRE INSURANCE CO.</b>	)	
Insurance Carrier	)	

**ORDER**

**STATEMENT OF THE CASE**

Claimant requested review of the April 9, 2015, preliminary hearing Order entered by Administrative Law Judge (ALJ) Pamela J. Fuller. Chris A. Clements of Wichita, Kansas, appeared for claimant. D. Shane Bangerter of Dodge City, Kansas, appeared for respondent and its insurance carrier (respondent).

The ALJ denied claimant's request for temporary total disability (TTD) benefits because no evidence was presented taking claimant off work from June 18, 2014, through October 19, 2014, and the ALJ found claimant was terminated for cause. Additionally, the ALJ denied claimant's request for temporary partial disability (TPD) benefits because claimant was terminated for cause.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the April 8, 2015, Preliminary Hearing and exhibits; the transcript of the June 25, 2014, evidentiary deposition of claimant; the transcript of the September 10, 2014, evidentiary deposition of Lawrence Romero; and the transcript of the November 5, 2014, evidentiary deposition of Artemio Lopez and exhibit, together with the pleadings contained in the administrative file.

**ISSUES**

Claimant does not dispute the denial of TTD benefits. However, claimant argues the ALJ exceeded her jurisdiction in denying the request for TPD compensation by creating a defense nonexistent in the language of K.S.A. 2012 Supp. 44-510e(a)(1) and K.S.A.

2012 Supp. 44-510c(b). Claimant contends there is no statutory authority to deny TPD compensation if an employee is terminated for cause.

Respondent argues the Board lacks jurisdiction to review claimant's appeal, and thus the appeal should be dismissed. Alternatively, respondent maintains the Order should be affirmed.

The issues for the Board's review are:

1. Does the Board have jurisdiction to review claimant's appeal?
2. If so, did the ALJ exceed her jurisdiction in denying claimant's request for TPD compensation?

#### **FINDINGS OF FACT**

Claimant began employment with respondent in September 2012. Claimant testified she was injured in January 2013 when the cable balancer holding pneumatic scissors broke, pulling her forward with its weight. The scissors, used to cut hocks from bulls, are large and weigh approximately 45 to 50 pounds. Claimant stated she sustained injury to her back when her safety belt caught her fall. Claimant went to the nurse's station and was treated with Tylenol and ice and restricted from work. Claimant was released to return to work as necessary on January 31, 2013, though she informed the doctor she continued to feel pain. Claimant stated she eventually had no symptoms other than tightness in her back, which she treated with Tylenol and ice as necessary.

Claimant testified a similar situation arose in September 2013 when the cable balancer holding the hock cutter broke a second time. Claimant stated the safety belt caught her fall, but she did not feel immediate pain. Claimant eventually had some pain in her back, but stated it gradually went away after self-treating with Tylenol and ice. Claimant's pain returned in late November, and she went to the emergency room on December 1, 2013, and was given pain medication. Claimant testified she believed she had a possible circulation problem as she began experiencing numbness in her legs. Claimant later underwent an MRI and was told she had a herniated disc.

Claimant returned to the nurse's station on December 17, 2013, with complaints of back pain. Claimant then began treatment with Dr. Hunsberger, who provided her with pain medication before referring her to Dr. Henry. On January 3, 2014, respondent terminated claimant for excessive absenteeism. Claimant testified some of her absences were related to her work injury and should not be counted. Respondent indicated claimant could have continued working at the same wage, and it would have accommodated claimant's temporary restrictions, had she not been terminated for cause.

Claimant testified she received unemployment benefits for approximately two months prior to her deposition on June 25, 2014. Claimant explained her unemployment benefits were suspended for about two weeks because she was unable to work one week due to illness. At the time of her deposition, claimant believed she would again receive benefits.

On October 5, 2014, claimant began working for a new employer at a reduced wage. Claimant continued working through December 13, 2014.

### **PRINCIPLES OF LAW**

K.S.A. 2012 Supp. 44-510e(a)(2)(E)(i) states:

To establish post-injury wage loss, the employee must have the legal capacity to enter into a valid contract of employment. Wage loss caused by voluntary resignation or termination for cause shall in no way be construed to be caused by the injury.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>1</sup> Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.<sup>2</sup>

### **ANALYSIS**

The Board can review only the issues listed in K.S.A. 2012 Supp. 44-534a(a)(2), which include: (1) whether the employee suffered an accident, repetitive trauma or resulting injury, (2) whether the injury arose out of and in the course of the employee's employment, (3) whether notice is given, or (4) whether certain defenses apply. The term "certain defenses" refers to defenses which dispute the compensability of the claim under the Workers Compensation Act.<sup>3</sup> The Board can also review preliminary decisions when a party alleges the ALJ exceeded his or her jurisdiction.<sup>4</sup>

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<sup>1</sup> K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, rev. denied 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, rev. denied 271 Kan. 1035 (2001).

<sup>2</sup> K.S.A. 2013 Supp. 44-555c(j).

<sup>3</sup> See *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

<sup>4</sup> K.S.A. 2013 Supp. 44-551(l)(2)(A).

The ALJ found claimant was terminated for cause and denied claimant's request for TPD. K.S.A. 2013 Supp. 44-534a grants authority to an ALJ to decide issues concerning the furnishing of medical treatment, the payment of medical compensation, and the payment of temporary disability compensation. The ALJ's authority includes the possibility she decided the matter incorrectly.<sup>5</sup> The ALJ did not exceed her authority by denying claimant's request for the payment of TPD.

Since the request for review of the ALJ's Order by claimant does not raise an issue of compensability enumerated in K.S.A. 2013 Supp. 44-534a(2), and there has been no showing the ALJ exceeded her authority, the application for Board review in this issue will not be considered for lack of jurisdiction.

### **CONCLUSION**

The ALJ did not exceed her jurisdictional authority. The Board does not have jurisdiction to hear claimant's appeal.

### **ORDER**

**WHEREFORE**, it is the finding, decision and order of this Board Member that the appeal of the Order of Administrative Law Judge Pamela J. Fuller dated April 9, 2015, is dismissed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of May, 2015.

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HONORABLE SETH G. VALERIUS  
BOARD MEMBER

c: Chris A. Clements, Attorney for Claimant  
cac@cl.kscoxmail.com  
angie@cl.kscoxmail.com

D. Shane Bangarter, Attorney for Respondent and its Insurance Carrier  
shane@rbr3.com

Pamela J. Fuller, Administrative Law Judge

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<sup>5</sup> See *Alleva v. Wichita Business Journal, Inc.*, No. 202,618, 1998 WL 599406 (Kan. WCAB Aug. 11, 1998).